AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

150TACD2022

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal by the Appellant to the Tax Appeals Commission ("the Commission") against an assessment of 22 April 2021 made by the Revenue Commissioners ("the Respondent") under section 28(11) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 ("the 2020 Act"). Pursuant to this assessment, the Respondent sought the refunding of payments totalling €6,094.94 made to the Appellant under the Temporary Wage Subsidy Scheme (alternatively "the TWSS" and "the scheme") during the period 30 April 2020 - 31 July 2020.

2. As a consequence of this assessment the Respondent also assessed the Appellant under section 990 of the Taxes Consolidation Act 1997 ("the TCA 1997") as owing additional PRSI payments in the amount of €636.21. This calculation was not challenged at hearing and the outcome of the appeal in relation to the Appellant's entitlement to TWSS payments must also determine whether additional PRSI was owed.

3. This appeal proceeded by way of oral hearing heard on 31 August 2022. The Commissioner was grateful to have the benefit of written and oral legal submissions furnished by both parties.

Background

4. The facts relevant to this appeal were largely agreed. The Appellant is a PAYE employee involved in [redacted], who employs a domestic child-carer for her children.

5. On 27 March 2020 the Oireachtas enacted the 2020 Act in order to mitigate the adverse public health and economic effects of COVID-19. As part of this, section 28 therein, commenced upon enactment, established the TWSS. The aim of this scheme was to provide much needed support to employees whose employment was at risk as a consequence of restrictions on their ability to work. The TWSS was designed so that it would be employers that would apply for and receive financial support for the specific purpose of paying employee wages in a time of reduced economic activity.

6. On or about 29 March 2020 the Appellant self-assessed herself as being eligible to receive TWSS payments in respect of the child-carer who she employed to mind her children. This child-carer was unable to attend work from 23 March 2020 as a consequence of the restrictions then in place. The Appellant gave evidence that at this time she believed she would have had difficulty continuing to fund the payment of the child-carer's wages without subsidy.

7. On 21 April 2020, the Appellant contacted the Respondent with an enquiry regarding how to make a payroll submission in respect of her child-carer that included a claim for payment under the TWSS. The Respondent duly replied to this enquiry on 29 April 2020 with instructions regarding how to make the payroll submission including the claim.

8. From 30 April 2020 – 31 July 2020 the Appellant received support payments under the TWSS in respect of wages due to her child-carer in the amount of €6,094.94. The Appellant ceased to receive wage subsidy payments following the replacement of the TWSS by the EWSS.

9. On 11 November 2020 the Appellant received correspondence from the Respondent entitled "*Temporary Wage Subsidy Scheme (TWSS) – Domestic Employers".* This stated that the Appellant had not been eligible to receive the aforementioned TWSS payments on the grounds that her "*…status as an employer* [was] *not linked to the operation of a business"* and that she did not "*…appear to meet the 25% reduction in turnover test".* Consequently, all amounts paid to the Appellant under the TWSS were repayable.

10. The Respondent elaborated on its reasoning in correspondence of 15 December 2020, stating therein that is was essential that "*the business of an employer has been adversely affected to a significant extent".* According to the Respondent the *"…provision of domestic*

duties by an employee within a private household where the owner is the occupier of the private household are not business activities." In support of this contention, the Respondent cited the International Labour Office's Domestic Workers Convention, 2011.

11. The Appellant answered this on 31 December 2020, disagreeing with the view expressed by the Respondent on a number of grounds. Among the matters cited by the Appellant were the overriding purpose of the TWSS (namely to support employees); the content of guidance documents created by the Respondent on the operation of the scheme; and the existence of her correspondence of 21 April 2020 in which she informed the Respondent that her employee was a domestic child-carer. The Appellant also stated that the employment of a child-carer had been essential to permitting her to perform her role with her employer. Regarding the "25% reduction in turnover test" enumerated in section 28(3) of the 2020 Act, the Appellant stated in this correspondence that her employer had reduced her own wages, which she considered to be akin to her own personal turnover.

12. The Respondent sent further correspondence to the Appellant on 8 February 2021 and 22 April 2021 in which it re-iterated that the employment of a child-carer did not constitute a "business", which it defined as including "*manufacturing, buying, selling or supplying goods or services with a view to making a profit".* On the latter date it made its assessment under section 28(11) of the 2020 Act which was duly appealed by the Appellant to the Commission by way of Notice of Appeal delivered on 14 May 2021.

Legislation and Guidelines

13. Section 28 of the 2020 Act established the TWSS and subsections (2) and (3) therein set out the following criteria for an employer to qualify for support:-

> *"(2)*
>
> *This section shall apply where—*
>
> *(a) the business of an employer has been adversely affected by Covid-19 to a significant extent with the result that the employer is unable to pay to a specified employee the emoluments the employer would otherwise have normally paid to him or her,*
>
> *(b) notwithstanding the existence of the circumstances referred to in paragraph (a), the employer has the firm intention of continuing to employ the specified employee (and to pay to him or her emoluments accordingly) and is making best efforts to pay to the employee some of the emoluments referred to in paragraph (a) during the applicable period, and*

(c) the employer has satisfied the conditions specified in subsection (4).

(3) The business of an employer shall be treated as being adversely affected to the extent referred to in subsection (2)(a) where, in accordance with guidelines published by the Revenue Commissioners under subsection (19), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce, there will occur in the period of 14 March 2020 to 30 June 2020 at least a 25 per cent reduction either in the turnover of the employer's business or in customer orders being received by the employer."

14. Under section 28(1) of the 2020 Act, "*employee*", is defined, in accordance with section 983 of the TCA 1997, as "*any person is receipt of emoluments". "Employer"* is defined as "*any person paying emoluments".* "*Business"* is not defined, however its ordinary meaning, as given by the Oxford English Dictionary, is "*the activity of making, buying, selling or supplying goods or services for money, commerce or trade"*.

15. Section 28(9) – (11) of the 2020 Act makes provision for the repayment of wage subsidy in the following circumstances:-

"(9) Where the Revenue Commissioners have paid to an employer a temporary wage subsidy in relation to a specified employee in accordance with subsection (5)(a) and it transpires that the employer has not paid to the specified employee an additional amount equivalent to the temporary wage subsidy in accordance with subsection (5)(d), or that the employer was not entitled to receive a temporary wage subsidy in respect of any individual, the temporary wage subsidy so paid to the employer shall be refunded by the employer to the Revenue Commissioners.

(10) An amount that is required to be refunded by an employer to the Revenue Commissioners in accordance with subsection (9) (in this section referred to as "relevant tax") shall be treated as if it were income tax due and payable by the employer from the date the temporary wage subsidy referred to in that subsection had been paid by the Revenue Commissioners to the employer and shall be so due and payable without the making of an assessment.

(11) Notwithstanding subsection (10), where an officer of the Revenue Commissioners is satisfied there is an amount of relevant tax due to be paid by an employer which has not been paid, that officer may make an assessment on the employer to the best of the officer's judgment, and any amount of relevant tax due under an assessment so made shall be due and payable from the date the temporary wage subsidy referred to in subsection (9) had been paid by the Revenue Commissioners to the employer."

16. Section 28(18) of the 2020 Act placed the administration of the TWSS under the care and management of the Respondent. Furthermore, section 28(19) of the 2020 Act provides that:-

> *"The Revenue Commissioners shall prepare and publish guidelines with respect to the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (3), will occur by reason of Covid-19 and the disruption that is being caused thereby to commerce."*

17. As is well-known, the necessity for a scheme providing state support for the payment of employees came about suddenly with the onset of the COVID-19 pandemic. Accordingly, the TWSS was established by legislation and made operational in a matter of weeks. To assist employers and employees, the Respondent published numerous guidelines, frequently updated, in the short period during which the TWSS was operational. Some of these were quoted by the parties in the hearing, however it is not necessary to list them all, and the parts quoted therefrom, in this determination. One document opened to the Commissioner, dated 20 April 2020, was entitled "*Temporary Wage Subsidy Scheme – Employer Eligibility and Supporting Proofs".* Under the heading "*Key Principle"* it stated:-

> *"[The Respondent's] general approach to businesses experiencing cashflow and consequent tax payment difficulties is to work towards agreeing mutually acceptable solutions that assist a return to viability as soon as possible. In any engagement [the Respondent] expects businesses to be able to produce relevant supporting documentation when requested to do so and to fully engage […] on any follow up discussions or checks.*
>
> *[The Respondent's] administration of the [TWSS] will operate on a similar basis – eligibility will initially be determined largely on the basis of self-assessment and declaration by the employer concerned, combined with a risk focused follow up verification by [the Respondent] involving examination of relevant business records where that is considered necessary."*

18. Under the heading "*COVID-19 Temporary Wage Subsidy Scheme Eligibility"* the same document stated:-

> "[The TWSS] *is available to employers across all sectors, excluding the Public Service and Non-Commercial Semi-State Sector. To qualify for the scheme, a business must be experiencing a significant negative economic disruption due to the COVID-19 pandemic.*
>
> […]

[The Respondent's] *purpose is to support businesses through the scheme; our approach will be based on a presumption of honesty and we expect businesses to approach the scheme in a similar manner. Application for the scheme is based on self-assessment principles – a qualifying employer declares that it is significantly impacted by the crisis. Key indicators are that the employer's turnover is likely to decrease by 25% for quarter 2, 2020; that the business is unable to meet normal wages or normal outputs and any other indicators are set out in our guidelines."*

19. Version 12 of the Respondent's "*Frequently Asked Questions on Guidance on the Operational phase of the COVID-19: Temporary Wage Subsidy Scheme"* was also opened during the hearing. At paragraph 1.1. therein it explained that the TWSS:-

    "… provides the payment of income supports to employers in respect of eligible employees where the employer's business activities have experienced significant negative disruption due to the COVID-19 pandemic."

20. At paragraph 1.5. of the same document the Respondent stated that its aim in the administration of the scheme was to "…*support employers and employees"* and that it would "*take a reasonable fair and pragmatic approach"* in so doing.

21. At paragraph 3.1, under the heading "*What is an eligible employee"* the document stated:-

    "*An eligible employee is someone who, because of the COVID-19 crisis their employer (see 2.4) cannot afford to fully pay, was on the employer's payroll on 29 February 2020, and the employee's pay and tax details were reported to* [the Respondent] *in Qualifying Payroll Submissions and who is being kept on the employer's payroll."*

22. The Domestic Workers Convention, 2011 ("the Convention"), cited both by the Appellant and the Respondent in submissions, is a United Nations treaty adopted by the International Labour Organization, a United Nations Agency. The Convention was ratified by Ireland on 28 August 2014. Its purpose is the setting of labour standards for domestic workers. It defines a domestic worker as "*any person engaged in domestic work within an employment relationship".* Clause 14.1 therein provides:-

    "Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity."

23. Section 28(5) of the 2020 Act provides:-

"Where this section applies, then, following the notification by the employer of the payment of emoluments to a specified employee in the applicable period in accordance with Regulation 10 of the Regulations, the following provisions shall apply:

…(d) on the payment of the emoluments to the specified employee which are the subject of the notification first-mentioned in this subsection by the employer, the employer shall include in that payment an additional amount equivalent to the temporary wage subsidy in relation to the specified employee…

(g) where paragraph (d) applies, the employer shall treat the specified employee concerned as falling within Class J9 of Pay Related Social Insurance for the purposes of the employer's obligations under Chapter 4 of Part 42 of the Act and the Regulations to report matters specified in that Chapter or the Regulations"

24. The net effect of this is that because the Appellant was in receipt of TWSS payments, her child-carer was to be treated as falling within PRSI class J9 and the employer contribution was set at 0.5%. In the absence of subsidy payments under the TWSS, the employer contribution would have been 8.8% in respect of an employee falling within PRSI class A0.

Submissions

Appellant

24. The Appellant submitted in the appeal that she fell within the scope of the TWSS as the employer of her child-carer. Firstly, it was clear that she fell within the definition of an employer and her child-carer that of an employee under the 2020 Act. Nowhere in the legislation, or in the guidance documentation published by the Respondent, was it suggested that domestic workers were to be excluded from being the subject of assistance in the payment of their wages. Moreover, exclusion would be inconsistent with Article 14.1 of the Domestic Workers Convention, 2011, to which Ireland is a signatory. This Article requires that Members give "no less favourable conditions" for domestic workers in respect of social security and protection.

25. The Appellant submitted that she did have a "business", which was adversely affected by the advent of COVID-19 and the resulting restrictions. Her business was [redacted], which she carried out in the capacity of a PAYE employee of a [redacted]. The adverse impact on her business was evidenced by a reduction in her own salary, although when this occurred and the exact scale of the reduction was not disclosed in evidence.

26. The Appellant submitted that prior to receiving payments under the TWSS, she had notified the Respondent that her application was in respect of her child-carer. No issue was raised until November 2020, well after the cessation of the scheme.

27. The Appellant further submitted that the approach taken by the Respondent regarding the exclusion of domestic workers and the breadth of the definition of "business" was inconsistent with its statement in its own guidelines that it would take a "*reasonable, fair and pragmatic approach"* to the support of employers and employees.

28. Lastly, the Appellant stressed that when they registered for TWSS they did so in good faith and believed that they were doing the right thing for their child-carer. The Appellant stated that had it not been for the payments she would not have been in a position to continue to employ the child-carer in circumstances where her own salary had been reduced and where the child-carer was unable to attend work due to the restrictions in place during the relevant period.

Respondent

29. The Respondent submitted that it was clear from the wording of section 28(2) of the 2020 Act that, in legislating, the Oireachtas chose to limit the scope of financial assistance to those whose employers that had a "business". This was a policy choice which, for good or ill, limited the discretion of the Respondent in the administration of the TWSS. The same limitation applies to the Commissioner in making its determination on the whether payments should have been made to the Appellant for the relevant period.

30. The Appellant was a PAYE employee. The [redacted] in which she worked was that of her employer and was not her own. This fact brought her outside the scope of the legislation. The Appellant's conflation of her employment with the business of her employer was misconceived. So too was the conflation of her emoluments earned with the "turnover" of a business, which under section 28(3) of the 2020 Act had to be reduced by 25% in order for an employer to qualify for subsidy payments.

31. The Respondent submitted that the TWSS, being a scheme designed to provide assistance to employers was not taxation legislation and, therefore, the stricter rules relating to the construction of such legislation did not apply. The purpose of the legislation was clearly to provide support for the employees of employers engaged in business activity. Even if it was held to be taxation legislation, however, the application of the principles of legislative interpretation set out in cases such as *Bookfinders v The Revenue Commissioners* [2020] IESC 60 still resulted in the Appellant falling outside the scope of the TWSS.

32. The Respondent submitted that even if it was found that the Appellant fell within the scope of the TWSS because the business of her employer could be taken as her own, she had not provided any evidence to prove that it had met the 25% reduction test. This was equally the case if the reduction was to be judged by reference to her own emoluments. As in all tax appeals, the burden of proof rested with the Appellant and she had failed to discharge this.

33. The Respondent submitted that none of the guidelines and assistance documents opened suggested that the Appellant would be entitled to subsidy payments in respect of her child-carer. On the contrary, the need for an employer to have a business was stated on many occasions. It was also submitted that the communication between the Appellant and the Respondent of 22 April 2020 was not relevant to the question to be decided. At all times it was clear that the scheme was one whereby employers had to self-assess their eligibility and the risk of an assessment requiring repayment was apparent from the legislation.

Material Facts

34. The facts material to this appeal were as follows:-

- the Appellant was a PAYE employee working in [redacted];
- the Appellant employed a domestic child-carer during the period March 2020 – August 2020;
- upon the spread of COVID-19 and the advent of government restrictions the child-carer was no longer able to attend work in the Appellant's house;
- the Appellant continued to employ and pay the child-carer's wages throughout the relevant period, which included payments she received under the TWSS;
- on or about November 2020 the Respondent commenced an inquiry into the Appellant's eligibility to receive payments under the TWSS;
- the Respondent found that the Appellant had not been entitled to these payments, totalling €6,094.94, on the grounds that the employee had not been employed in a "business";
- on or about 22 April 2021 the Respondent made an assessment under section 28(11) of the 2020 Act requiring repayment of the sums received;
- the Appellant duly appealed this assessment to the Commission.

Analysis

35. In the first instance two net issues arise in this appeal. Firstly, does the legislation require that an employer in receipt of subsidy payments under the TWSS have a "business"? Secondly, if the legislation does require this, what is the scope of the definition of the term "business"?

36. The Appellant argued in the course of the hearing that the exclusion of domestic workers would be unjust and contrary to an article of the Convention, an international treaty to which Ireland is a signatory that aims to ensure the protection of the rights of domestic workers. The Appellant also argued that the refusal of the Respondent to adopt the view that the TWSS included such workers in its scope amounted to it administering the scheme in an unreasonable and un-pragmatic manner, contrary to guidance documents it had issued in the period April – September 2020.

37. In relation to this, the Commissioner finds that its statutory function is to establish by reference to the wording of section 28 of the 2020 Act whether the Appellant was entitled to receive subsidy payments. The Commissioner is not empowered to determine issues by reference to principles of equity or fairness. Nor is there jurisdiction to determine the constitutionality of legislation or, for that matter, whether the State has enacted legislation that adheres to international conventions of which it is a member.

38. As the Court of Appeal held in *Lee v Revenue Commissioners* [2018] IECA 108, the role of a Commissioner is to determine by reference to tax legislation whether tax is owing and, if it is, the amount. In this regard, the content of guidance documents, while regularly a useful aid, cannot have the effect of replacing or amending legislation passed by the Oireachtas.

39. There is no doubt in this case that the Appellant falls within the statutory definition of an "employer" and the child-carer within that of an "employee". However, it also is explicit in the wording of section 28(2) of the 2020 Act that to qualify under the TWSS an employer must have a "business". Moreover, under section 28(3) of the 2020 Act this business must have been affected adversely by reason of COVID-19 related disruption.

40. Section 28(1) of the 2020 Act gives no definition of the word "business". In the course of the oral hearing of this appeal there were submissions by the Respondent to the effect that ordinary principles of interpretation, rather than principles relating to taxation legislation, should apply. For the purposes of determining this appeal however the Commissioner applies the rules of interpretation summarised by McDonald J in *Perrigo Pharma International Activity Company v McNamara & Ors* [2020] IEHC 152 at paragraph 74:-

"*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the*

statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

41. The ordinary meaning of the word "business" is, as the Respondent submitted, the *"manufacturing, buying, selling or supplying goods or services with a view to making a profit".* The core of the Appellant's case is that her employer's business activities can be attributed to her for the purposes of falling within section 28(2) of the 2020 Act. The Commissioner finds this argument to be misconceived. The Appellant is not the employer in the [redacted] business, rather she is its employee. It cannot be said that this business is the business "of" the Appellant. It is that of someone else altogether.

42. Nor indeed can the words "*turnover*" or "*customer orders*", relevant to the question of adverse impact, be conflated with her wage as an employee. These are themselves terms with an ordinary meaning and it would not have been the intention of the Oireachtas that they be equated by way of analogy with something else entirely, namely the Appellant's own salary.

43. Section 28(2) and (3) of the 2020 Act demand the existence of a business "of the employer" that has been adversely affected. This being so, the Appellant, who does not have a business, falls outside the scope of the TWSS and therefore should not have received the subsidy payments over the period April – July 2020 . Consequently, the assessment of the Respondent of 22 April 2022 must be affirmed.

44. The Commissioner accepts that the Appellant registered for the scheme in good faith, viewing herself to be an eligible employer and the application to be in the interest of her employee, who she said would otherwise have been let go. Her honesty in this regard is evidenced by the fact that when in contact with the Respondent prior to receiving her first payment, she stated clearly that the employee in question was her child-carer. Nevertheless, as already noted, questions of equity or arguments in the nature of legitimate expectation arising from acts or omissions of the Respondent are outside the

jurisdiction of the Commission. Consequently, they cannot have an impact on the outcome of this appeal.

45. This being so, the Respondent's assessment regarding the payment of additional PRSI in the amount of €636.21, based on the application of a rate of 8.8% as opposed to a rate of 0.5% applicable to a "specified employee", must also stand.

Determination

46. The result of this appeal is that the Respondent's decision to assess the Appellant as owing the sum of €6,094.94 in TWSS payments received, plus additional PRSI of €636.21 must stand. The Commissioner appreciates that the Appellant may be disappointed with the result of this determination. The Appellant was however correct to appeal in order to establish the correct position regarding her liability.

47. This appeal is determined under section 949AK of the TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Conor O'Higgins
Appeal Commissioner
7 September 2022